United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,417

Maurice Deans,

Appellant,

v.

United States of America,

Appellee

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert E. May
Gene P. Bond
1700 K Street, Northwest
Washington, D. C. 20006

Attorneys for Appellant
(Appointed by this Court)

March 16, 1964

STATEMENT OF QUESTIONS PRESENTED

(1) When a person accused of alleged narcotics violations is within the jurisdiction, and both his physical appearance and habits are well known by the officer scheduled to be the major Government witness, does delay in prosecution of nineteen months after the commission of the first alleged violation comport with either the speedy trial clause of the Sixth Amendment or the due process clause of the Fifth Amendment?

(2) When evidence shows that a police undercover officer has made a series of attempts to elicit marihuana from accused, which attempts were based on friendship and sympathy, and further shows that the accused was in no way predisposed to engage in narcotics traffic and would not have procured marihuana but for the officer's solicitations, is entrapment established as a matter of law?

(3) Did the trial court err in admitting into evidence the alleged admissions of Appellant which were obtained by police during a nineteen hour delay after Appellant's arrest, during which time Appellant was compelled to remain in jail overnight without benefit of counsel or being advised of his rights?

(4) Did the trial court err in admitting into evidence Government's Exhibit No. 9 which was a notice of demand upon Appellant to produce a marihuana order form, when the circumstances surrounding the service of such notice and demand precluded Appellant's compliance? Did the trial court further err in not framing his instructions to the jury so as to include these facts?

INDEX

INDEX (cont'd)

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (cont'd)

Constitution, Statutes & Rules:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,417

Maurice Deans,

Appellant,

v.

United States of America

Appellee.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

I

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291. A sixteen count indictment charging the Appellant Maurice Deans with

unlawfully transferring marihuana (26 U.S.C. §4742a) and obtaining as a transferee, marihuana without payment of the tax (26 U.S.C. §4744a) was filed with the court below on May 27, 1963. Appellant entered a plea of not guilty on May 31, 1963. Appellant was tried by a jury which rendered a verdict of guilty on all counts on July 11, 1963 and Appellant was sentenced to imprisonment for a period of five years pursuant to the lower court's judgment and commitment filed on July 15, 1963.

Appellant filed a notice of appeal and was permitted to proceed on appeal in forma pauperis by order of this Court dated February 3, 1964.

II

STATEMENT OF THE CASE

The sixteen count indictment contains allegations that Appellant violated Title 26 U.S.C. §§ 4742(a) and 4744(a) on eight different occasions during late 1961 and early 1962. The indictment lists eight separate dates (September 22, 1961, October 14, 23 and 28, 1961, November 18, 1961, December 13 and 22, 1961 and January 5, 1962) at which time the Appellant allegedly committed acts violating,

on each occasion, Sections 4742(a) and 4744(a) of Title 26, United States Code.[1/]

On April 24, 1962, approximately three and one-half months after the date of the last alleged violation, the prosecution's major witness, undercover officer J. B. Thompson from the Narcotics Section of the Metropolitan Police Department, applied for a warrant for the arrest of a "John Doe Younger." This was the only name or nickname which the police claimed they knew the Appellant by up until the time of Appellant's arrest (Tr. 39, 168). The warrant was issued on the day of Officer Thompson's sworn

---

1/ The evidence concerning each transaction consists solely of the uncorroborated testimony of an undercover police officer, J. B. Thompson, who became a member of the Metropolitan Police Department on August 7, 1961, commenced working in an undercover capacity during that same month of August, 1961 and first met the Appellant during the latter part of August, 1961 (Tr. 15, 16 and 66).

The transcript references to Officer Thompson's testimony concerning each of the alleged violations are as follows:

September 22, 1961 (Tr. 17-18, inclusive)
October 14, 1961 (Tr. 20-21, inclusive)
October 23, 1961 (Tr. 22-23, inclusive)
October 28, 1961 (Tr. 25-26, inclusive)
November 18, 1961 (Tr. 27-31, inclusive)
December 13, 1961 (Tr. 31-33, inclusive)
December 22, 1961 (Tr. 34-36, inclusive)
January 5, 1962 (Tr. 36-38, inclusive)

complaint, April 24, 1962 and remained outstanding for almost a year before Appellant was finally arrested in the mid-afternoon of April 16, 1963 (Tr. 40). Appellant was arrested for the alleged violation of September 22, 1961 only because Thompson's complaint only dealt with this transaction. The testimony given before the United States Commissioner only concerned the offenses which purportedly occurred on September 22, 1961. Appellant's first notice that he was being charged with violations which allegedly occurred on the seven subsequent dates came approximately six weeks after his arrest, on May 28, 1963 when he was served with a copy of the indictment.

The police claimed that during the year the warrant was outstanding they had made several attempts to locate the defendant but had never found him (Tr. 39). The undercover officer Thompson was somewhat familiar, through his earlier association with the Appellant during the time that the alleged transactions took place, with Appellant's habits and with the places where Petitioner might be found. In fact, Officer Thompson, between the time of the issuance of the warrant and the time of Appellant's arrest, testified that he was "* * * constantly out in the vicinity where I had known him to hang out", in an effort to locate the

Appellant (Tr. 63-64, inclusive). Nevertheless, the record indicates that Appellant was both living and employed in the District of Columbia from February, 1962 up until the time of his arrest (Tr. 228, 286). Appellant testified to seeing Officer Thompson on two different occasions at two different places during the period that the warrant was outstanding. One such occasion was during the summer of 1962 at a Safeway Store on 14th and Park Road and the other occasion was in a pool room during November or December of 1962 (Tr. 246-248, inclusive). Officer Thompson denied seeing the Appellant between the time the arrest warrant was sworn out and the date of Appellant's arrest (Tr. 103, 105).

Acting in his undercover capacity, Officer Thompson first met Appellant during the latter part of August, 1961 and saw him on various occasions between the original contact and September 22, 1961 the date of the first transaction cited in the indictment (Tr. 66, 67, 125). During this period the officer testified that he became acquainted with Appellant on a friendly basis (Tr. 67). He further testified that he attempted to make purchases of marihuana from Appellant prior to September 22 but was unsuccessful (Tr. 67), and that he first brought up the subject of narcotics about the second time he saw Appellant (Tr. 68) but that Appellant did not sell

him any narcotics before September 22, 1961 (Tr. 71). Officer Thompson also testified that he might have told the Appellant that he wanted the narcotics for his girl friend because he needed to tell Appellant something to keep him interested (Tr. 70). Thompson also testified that on each occasion that he received marihuana from Appellant he had first asked him to buy the marihuana (Tr. 92).

Appellant testified that he first met Officer Thompson in August of 1961 and when first meeting him considered him to be a stranger because of the Alabama license plates on his car (Tr. 249-250). He testified that on their second meeting Thompson asked him if he knew where he could get him some "reefers" and that the subject was dropped after Appellant responded in the negative (Tr. 251-252). According to Appellant's testimony, Thompson, on the next occasion, asked him for some reefers on the basis that they were for his girl who "* * * had gone through a lot of changes" or was sick and that he would be doing Thompson a big favor by getting the marihuana for him (Tr. 252, 271). Although Appellant stated that he could not remember whether the alleged transactions took place on the specific dates named in the indictment, his testimony does show that it was not until the third or fourth time in which the subject of

marihuana came up that he got the marihuana for Thompson and, again, this was after Thompson had requested the marihuana as a favor for his girl friend who was going through "a lot of changes" (Tr. 255). Appellant testified that after this request was made he learned from some of his friends in a pool room where he could get some "reefers" (Tr. 258). Thompson then gave Appellant five dollars and kept his wallet containing a drivers license, registration card, etc., for security while Appellant went to a person named Redfield, whom he had been told had the marihuana, and bought five marihuana cigarettes. Appellant then returned and gave the five sticks of marihuana to Thompson in return for a dollar for his trouble (Tr. 255-258).

Appellant testified that he was quite friendly with Officer Thompson during this period but that he never knew him by any other name than "Dap" and never realized he was a police officer until he was arrested (Tr. 259, 261, 266). He testified that prior to meeting Thompson he had never purchased narcotics or marihuana before, that he had never attempted to sell any narcotics to Officer Thompson or anyone else on any prior occasion and that previously he had never had any connection with narcotics or marihuana (Tr. 261). Appellant's police record shows three forfeitures

of ten dollars collateral on disorderly charges, one forfeiture of ten dollars collateral on an imcommoding sidewalk charge, one "no papers" on a disorderly charge, one thirty-day suspended sentence on a disorderly charge and one year's probation for a petty larceny conviction arising out of an original charge of robbery (pickpocket). There is no indication of a previous narcotics violation. Appellant did testify that one time, at a party with Thompson, he took a couple "drags" off a marihuana cigarette (Tr. 279).

At the close of the Government's case (Tr. 202), Appellant moved for a judgment of acquittal on the basis that the Government's evidence showed that undercover Officer Thompson induced Appellant to commit the offense, that there was insufficient evidence of Appellant's predisposition to commit the offense to reach the jury and, therefore, that the defense of entrapment had been shown as a matter of law (Tr. 203-208, inclusive). The trial court denied the Appellant's motion at the close of the Government's case and, later, at the close of all the evidence (Tr. 208, 300-301, inclusive).

The question of whether or not Appellant was denied the right to a speedy trial due to the lengthy interval between the alleged offenses and the arrest of the Appellant

was raised originally by Appellant's per se motion to dismiss the indictment filed on May 8, 1963 and was later supported by appointed trial counsel's memorandum filed on June 12, 1963. This motion was denied by a pre-trial judge on June 14, 1963 without prejudice to its renewal at trial. At the trial this motion was before the trial judge who at first indicated that the interests of both sides would be best served if the hearing on the motion took place prior to the trial (Tr. 4-5, inclusive).

Accordingly, Appellant's court appointed counsel below made what seemed to be at least part of his argument on the motion and then the trial judge called for an off-the-record conference after which he announced that it would be in the best interest of both parties to proceed with the trial first and hear the motion at some later time, not necessarily prior to the jury verdict. Appellant's court appointed counsel below indicated to the trial court that the defendant would remain clothed with the presumption of innocence if the motion to dismiss were heard by the trial court prior to the jury returning its verdict but, upon reassurance by the court that the Appellant would have "* * * everything as of the time this motion is heard", he entered no objection to proceeding with the trial (Tr. 11-13, inclusive). The Appellant's motion was eventually denied

by the trial judge on July 15, 1963 after the trial had been completed and the guilty verdict returned.

During the course of Appellant's trial Government Witness Wilbur H. Jones, Narcotics Agent for the Bureau of Narcotics, testified to serving a marihuana demand notice on the Appellant on June 25, 1963. Jones's testimony and the notice form (Government Exhibit No. 9) were received in evidence over the objection of Appellant (Tr. 199, 201). The demand notice required that the Appellant produce in the office of Agent Jones, within 8 days from the date of service, the appropriate statutory order form issued by the Secretary of the Treasury to allow the transfer of marihuana (Tr. 200). The Appellant objected to admission of this evidence, on the ground that it was not proper for the trial court to grant a continuance of the trial on June 25, 1963 for the purpose of allowing the Government to make the demand on Appellant, who was in the District Court cell block at the time, when the Government had ample time prior to the original trial date of June 25th to make the demand (Tr. 195-196, inclusive). Appellant further objected, considering the fact that he was incarcerated at the time of service of the demand notice, on the ground that the period between the service of this notice on June 25, 1963 and the commencement of the trial on July 9, 1963 was not the reasonable

notice period required by the statute (Tr. 195-196, inclusive).

Appellant was arrested at 7th & T Streets, N. W. on April 16, 1963 at approximately 3:15 P.M. (Tr. 162). Detective Virgil Hood, who along with Officer Thompson, arrested Appellant, testified that he was in the same car with the Appellant on the drive to police headquarters (Tr. 162). Detective Hood further testified to a conversation he had with the Appellant while they were in the car in the basement of Police Headquarters (Tr. 164). He also testified to a further conversation with the Appellant after they had arrived at the Narcotics Squad office. During this second conversation Officer Thompson and Officer Fogel were present (Tr. 164). After the conversations took place Appellant was placed in jail overnight and taken before the United States Commissioner on the following morning, April 17, 1963 at approximately 10:00 A.M. for purposes of a preliminary hearing (See record of preliminary hearing).

The substance of this conversation, or both conversations, were recorded on a Police Department Form No. 111 and, seemingly, other police reports (Tr. 176-186, inclusive). The written reports recorded admissions by the Appellant during these conversations and these admissions, as reflected

in the reports, were read into evidence (Tr. 185). There was no particular objection by Appellant's defense counsel at the time the admissions came into evidence despite an earlier indication that he was aware of the problem (Tr. 165). Neither did the trial court prevent the admission of the testimony concerning the admissions (Tr. 185).

At the close of trial, and after deliberation, on July 11, 1963 the jury returned a verdict of guilty on all counts. This appeal followed.

III

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence.

United States Code

Title 26 §4742 Order Forms

> (a) General requirement. - It shall be unlawful for any person, whether or not required to pay a special tax and register under Sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 26 §4744 Unlawful Possession

> (a) Persons in general. - It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4741(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this Section and of liability for the tax imposed by Section 4741(a).

Federal Rules of Criminal Procedure

> Rule 5(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

IV

STATEMENT OF POINTS

1. The lower court erred in denying Appellant's motion to dismiss the complaint for lack of the speedy trial guaranteed him by the Sixth Amendment.
2. The lower court should have granted Appellant's motion for judgment of acquittal and prevented the issue of entrapment from reaching the jury because the evidence clearly disclosed an active participation by the Government in the instigation of the offence and no predisposition on the part of the Appellant to commit the offense. Furthermore, the Government failed to prove any facts justifying its inducement of the Appellant to commit the offense.

3. The lower court erred in admitting evidence of Appellant's confession which was obtained during a period when Appellant was being illegally detained.

4. The lower court erred in receiving in evidence, over Appellant's objection, the marihuana notice and demand form (Government Exhibit No. 9) which was served on Appellant on June 25, 1963. The lower court further erred in not framing his instruction on the reasonableness of the notice and demand procedure in the context of the facts of this case.

V

SUMMARY OF ARGUMENT

The Appellant's right to a speedy trial under the Sixth Amendment to the Constitution was denied in the proceedings below in that he was subjected to prosecution for alleged violations which took place as much as nineteen months prior to his arrest. The reasons advanced by the prosecution were insufficient to justify the long delay in filing the complaint and the even longer delay in executing the arrest warrant. The arrest warrant was outstanding for a year despite the fact that the evidence showed Appellant to be within the jurisdiction and available for arrest during the entire period.

In a relatively simple narcotics prosecution there was no necessity for such a long delay in prosecution and Appellant was clearly prejudiced by being unable to recall facts needed to prepare an adequate defense.

The evidence showed that Appellant would not have committed the alleged offense but for the active inducement by the undercover police officer who prevailed upon Appellant's friendship and sympathy on a number of occasions prior to the allegedly unlawful transaction. Appellant was not a drug addict, not a narcotics peddler and had no prior history of participating in unlawful narcotics traffic. Thus he was in no way predisposed to violate the marihuana statute and the Government completely failed to meet its burden of proving his predisposition.

The Appellant was illegally detained after his arrest for a period of approximately nineteen hours prior to being brought before a magistrate and advised of his rights. During this illegal detention period the police secured an admission from the Appellant which was erroneously admitted in evidence.

During the trial Government Exhibit Number 9 was erroneously admitted in evidence over the objection of Appellant. This exhibit consisted of a notice and demand

form which was served on Appellant on the day the trial was originally scheduled to begin, June 25, 1963, while Appellant was incarcerated in the District Court cell block. The trial was continued from June 25, 1963 to July 8, 1963 at the request of the Government in order that it might serve this form on the Appellant and comply with one of the provisions of the statute. This procedure was unreasonable in that, under the circumstances, Appellant could in no way comply with the demand to produce the required order form and the trial court should have instructed the jury on the facts involved rather than merely reading the statute.

VI

ARGUMENT

A. The Trial Court Erred In Denying Appellant's Motion To Dismiss The Complaint For Lack of the Speedy Trial Guaranteed By the Sixth Amendment*

The first of Appellant's alleged violations of the Marihuana Tax Act took place on September 22, 1961. The last of the alleged violations occurred on January 5, 1962. The Appellant was not put on notice of any of the

---

* With respect to this point Appellant desires the Court to read transcript pages 4-13 incl., 38-39 incl., 61-65 incl., 101-106 incl., 160-163 incl., 168-175 incl., 211-227 incl., 234-248 incl., 285-288 incl. and 290-296 incl.

charges until he was arrested during the afternoon of April 16, 1963 - some nineteen months after the date of the first offense listed in the indictment. Moreover, Appellant was not notified of the charges specified in counts 2 through 16 of the indictment until he was served with the indictment on May 28, 1963 - some twenty months after the date of the first offense.

It is therefore evident that there was a substantial delay in instituting this prosecution. Appellant submits that this delay was unreasonable in that the Government was unable to produce any evidence which would justify the delay. The delay was prejudicial to the Appellant in that, due to ordinary memory lapse, he was unable to recall the particular dates and circumstances involved. Finally, under the circumstances of this case, the delay was a denial of Appellant's right to a speedy trial under the Sixth Amendment to the Constitution.

Appellant is not unaware of the view of certain members of this Court that a claim relating to a delay between the date of the offense and the institution of a criminal prosecution is not covered by Rule 48(b) of the Federal Rules of Criminal Procedure or by the Sixth Amendment, but rather relates to the running of the applicable statute of limitations,

Nickens v. United States, _____ U.S. App. D.C. _____, 323 F.2d 808, 809 (1963). Nevertheless, because of factors involved in narcotics violations which make it difficult for defendants to adequately defend against the charges,[2/] the long delay in this case seriously prejudiced the Appellant. For example, he was unable to remember what occurred on many of the dates listed in the indictment (Tr. 255). Moreover, as stated in dissent in the Tee Ann Wilson order cited, supra, (Footnote 2), the delay in that case in putting the defendant on notice of the charge was six months, the delay in Nickens, supra, was seven and one-half months and the delay in Ross v. United States, No. 17877, where this Court, on January 28, 1964, remanded the case to the District Court to conduct a hearing on the "* * * reasonableness vel non of the delay occurring between the alleged offense by Appellant and the Appellant's arrest therefore, and its effect, if any, on the defense of the case", was seven months. The delay in putting the defendant on notice of the charge in the instant case was 19 months.

In these circumstances, and for reasons to be more fully discussed, infra, Appellant submits that the thrust of the concurring opinion in Nickens, supra, is more applicable to this appeal than that of the majority opinion, particularly

---

2/ As recently recognized by the dissenters to the order denying rehearing en banc in Tee Ann Wilson v. United States _____ U.S. App. D.C. _____, _____ F.2d _____, (No. 17,895, February 13, 1964).

that portion of the concurrence in which it is stated:

> Delay in bringing a complaint may violate Sixth Amendment rights. This court, without dissent, said only last year: '[T]he constitutional guarantee protects against undue delays in presenting the formal charge as well as delays between indictment and trial. The Supreme Court's affirmance of Judge Thomsen's ruling in Provoo, infra, seems to have settled the point. See also our opinion in Taylor, infra. In a non-capital case, it is true, mere delay in presenting the charge will rarely work a deprivation of the constitutional right, for permissible time in that instance is normally governed by the statute of limitations. Yet, if the delay is 'purposeful or oppressive', Pollard v. United States, 352 U.S. 354, 361 . . . even an indictment within the limitation period may come too late to square with the Sixth Amendment." Mann v. United States, 113 U.S. App. D. C. 27, 29-30 n. 4, 304 F.2d 394, 396-397, n. 4 (1962), cert. denied, 371 U.S. 896 . . . (1962). See United States v. Provoo, supra; Taylor v. United States, 99 U.S. App. D.C. 183, 238 F.2d 259 (1956). That the delay in doing justice in this case occurred between offense and formal complaint, rather than between complaint and indictment or indictment and trial, does not immunize it from the constitutional command. The right of a suspect to speedy determination of guilt or innocence is not lost merely because the delay in the process occurs before the formal charge, rather than after. Mann v. United States, supra.
>
> Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent

> man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors, (footnotes omitted, 323 F.2d 808 at 812-813).

The length of the above quotation is necessitated by the clear applicability of the language to this appeal.

The Government attempts to justify the delay in arresting Appellant on the basis that they made several attempts to locate Appellant after the warrant was issued on April 24, 1962, but were not able to locate him. Both undercover officer Thompson and Detective Hood testified that they were unable to locate Appellant because they did not know his correct name, Maurice Deans, until he was finally arrested on April 16, 1963 (Tr. 39-40, 163). The Government also attempted to justify the delay between the last alleged offense on January 5, 1962 and their application for the warrant for Appellant's arrest on April 24, 1962 on the basis that Officer Thompson's investigation was not complete until April 24 and the police did not want to disclose Thompson's identity prior to the completion of his investigation.

Considering the nature of Thompson's testimony it is difficult to imagine why he would need three and one-half months to complete his investigation in this case. It is also difficult to imagine how Thompson's applying to a magistrate for an arrest warrant or being in "downtown buildings" taking whatever administrative steps might be necessary to institute a prosecution (Tr. 160) would disclose his identity over a very wide sphere.[3/]

In any event, despite the fact that the officers testified that they went through various police files and attended various "roll calls" (Tr. 65), visited a certain place where Appellant had told Thompson he lived (Tr. 104-105), and only knew the Appellant by the name "John Doe Younger" (Tr. 39), there are two facts of record which

---

3/ The majority opinion in Nickens, supra, (323 F.2d at 810 n.2) does recognize that delay between offense and prosecution can be so oppressive as to be a denial of due process. Appellant submits that when one examines all of the police "efforts" to find Appellant and begin this prosecution, within the framework of all of the evidence, he is left with a feeling that the police worked on moving this case along with an all too casual attitude. Officer Thompson testified he was at the Police Acadamy from February 1962 to July, 1962 and unable to do much investigation work (Tr. 297).

Appellant submits that police handling of the institution of the prosecution in this case equates with the "purposeful and oppressive" delays in Pollard v. United States, 352 U.S. 354 (1957) and that the due process clause of the Fifth Amendment is applicable to the case under review as well as the speedy trial clause of the Sixth Amendment.

render both the Government's testimony in this regard and, therefore, their actual diligence in commencing this prosecution against the Appellant, seriously suspect.

Appellant testified to seeing Officer Thompson on two different occasions at two different places during the period that the warrant was outstanding. Appellant did not merely testify that he saw Officer Thompson, he testified generally to the time of the meeting, the place of the meeting and to some of the conversation which took place between Officer Thompson and himself. Appellant testified that sometime during the summer months of 1962 he was sitting in a car of a friend when he saw Officer Thompson come out of a Safeway Store located at the corner of 14th Street and Park Road, N. W. Appellant called to Thompson and asked him where he had been and Thompson replied that he had been out of town to his father's or mother's funeral. Appellant further testified that he saw Thompson in November of 1962 in the pool room where Appellant spent his leisure time. On this occasion Appellant testified that Thompson approached him and asked him to go downtown to the "Harrison Narcotics" and answer some questions. Appellant said he did not know anything about Harrison Narcotics and walked away. Appellant

also testified that he did not know that Thompson was a police officer when he saw him in the pool room in November 1962 (Tr. 246-249, inclusive).

The other fact of record concerns the testimony of Gloria Atkinson, a girl friend of Appellant, who testified she had known Appellant for about fifteen years (Tr. 213). Atkinson testified that Appellant and one "James" whom she identified in the court room as Officer Thompson came by her house and that she, in the presence of Officer Thompson, referred to the Appellant as Maurice (Tr. 215). She also testified that she saw Officer Thompson on various occasions after their first meeting (Tr. 219-226). If Atkinson's testimony is true then Officer Thompson must have had some idea of Appellant's correct first name (Tr. 293).

In considering whether or not Appellant's testimony in this regard should be given any weight, or whether it must be discounted as the exercise of a vivid imagination, it should be remembered that when Officer Thompson denied seeing Appellant on these occasions he simply answered in the negative without further explanation (Tr. 103). It is also difficult to conclude that Appellant would have any reason to commit perjury on this point by manufacturing the testimony when he later testified to getting the marihuana

for Thompson after being prevailed upon over a period of time (Tr. 257).

If it is assumed that Appellant's testimony concerning his 1962 contacts with Officer Thompson presents what actually occurred one wonders why he was not arrested then instead of continuing the delay in instituting the prosecution. But even if the 1962 contacts are ignored the question of whether the delay in this case represents no more than that, "* * * reasonably attributable to the ordinary processes of justice" remains, Williams v. United States, 102 U.S. App. D.C. 51, 250 F. 2d 19, 21 (1957). Even if the second criteria of the Williams case, supra, is the only one employed to test the validity of this conviction, the conviction must be set aside because it is clear that the Government has completely failed to show that the Appellant "* * * suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay," 250 F. 2d at 21.

There is certainly no question here that the delay was caused only by the Government, as the Appellant had no control over instituting a pending prosecution of which he was not even aware. The very nature of this type of criminal prosecution makes it difficult to defend, see Tee Ann Wilson

order in dissent, supra, and, additionally, Appellant, as stated above, was seriously prejudiced in being unable to remember the particulars concerning the dates listed in the indictment (Tr. 255). Moreover, a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment, see Nickens, supra, at 814, and authorities there cited.

Finally, the Sixth Amendment is very clear in its emphasis that the accused

> "In all criminal prosecutions, * * * shall enjoy the right to a speedy and public trial."

In this case the Government's major witness was the undercover officer who, in gathering his information against Appellant, was familiar with Appellant's activities and whereabouts. The evidence is uncontradicted that Appellant was both living and employed in the District of Columbia during the entire time that the police were allegedly looking for him, armed with an outstanding warrant for his arrest (Tr. 228, 286). Appellant's landlady testified that he lived at 1327 T Street, N.W. and that he had been at this address from early January, 1962 until he was arrested, a period of time which coincided with the entire time the arrest warrant was outstanding (Tr. 235, 240). The landlady further testified that she saw

Appellant and Thompson together at 1327 T Street, N. W., sometime in 1962 (Tr. 236). Appellant himself testified that he was never out of town from April, 1962 until the date of his arrest (Tr. 286). When all of the above stated circumstances are considered it must be concluded that the delay in prosecution in this case remains unexplained and an unexplained delay is a delay without reason. A conviction in a narcotics possession case, which follows such a delay, does not comport with Appellant's rights under the Sixth Amendment and must be set aside.

B. Entrapment Was Proved As A Matter of Law And The Trial Court Erred In Permitting The Question To Reach The Jury*

1. The Evidence Disclosed an Active Participation by the Government In the Instigation of the Offense

This court is already aware that narcotic arrests, as distinguished from arrests for other offenses, are typically:

> "* * * shaped by the police, at a time of their choice, against a suspect of their choice, before witnesses of their choice. Thus, the Government has almost total control of the evidentiary situation." Nickens, supra, 323 F.2d 808 at 814 (1963)

See also Trent v. United States, 109 U.S. App. D.C. 152 n. 2, 284 F.2d 286, 288 n. 2 (1960).

*With respect to this point Appellant desires the Court to read transcript pages 16-18 incl., 66-74 incl., 90, 99-100 incl., 203-208 incl., 249-272 incl., 283-286 incl., and 300-301 incl.

Justice Frankfurter has also noted, in his concurring opinion in Sherman v. United States, 356 U.S. 369 (1958), that,

> "* * * in every case of this kind the intention that the particular crime be committed originates with the police and without their inducement the crime would not have occurred." 356 U.S. at 382.

Consequently, as Justice Frankfurter observed, we start with police solicitation in this type of case and it is not of much assistance to talk about where the intent to commit the crime originated or whether or not the criminal conduct was the product of the "creative activity" of the law enforcement officials, see 356 U.S. at 382. Justice Frankfurter, then, recognized that police conduct in these cases needed regulation and that attention must be focused upon the particular police conduct in each case. The Justice noted that the setting in which the inducement takes place is "* * * highly relevant in judging its likely effect" (356 U.S. at 383) and that "* * * certain police conduct to ensnare [a defendant] into further crime is not to be tolerated by an advanced society". (356 U.S. at 383). The opinion further noted that police "Appeals to sympathy, friendship, the possibility of exorbitant gain, and so forth * * *" could not be tolerated, (356 U.S. at 383).

The facts surrounding the inducement in the instant case, when tested against these Sherman criteria clearly show an abuse of police power and result in the establishment of the defense of entrapment.

Appellant originally met undercover officer Thompson in August, 1961 and when first meeting him considered him to be a stranger to the area because of the Alabama license plates on his car (Tr. 249-250). On the first occasion they met Thompson indicated that he was desirous of some female companionship so Appellant took him to an establishment called the Ko Ko Club where two girls were located. After socializing together on that first evening, Thompson and the Appellant left each other and the Appellant gave Thompson the telephone number of the pool room at which Appellant could be located when he was not working. The next occasion in which there was any contact between Appellant and Thompson was in a phone call the next day and then, in what was the third contact, but only the second meeting in perosn, Thompson asked the Appellant if he could get him some "reefers." Appellant said no and "* * * the conversation just went blank" (Tr. 251). By this time it was the month of September and when Thompson saw Appellant again, seemingly the second time during the month of September, he again asked the Appellant

for "reefers", this time asking for them for his girl friend who was going through "* * * a lot of changes" (Tr. 252). Thompson told Appellant that he would be doing Thompson a big favor if he would get him the reefers. Appellant testified that he did not know what Thompson meant when he said his girl friend was experiencing these changes but that Thompson had said she was [illegible] (Tr. 271).

Appellant also testified that he had told Thompson that he did not know where to get any reefers (Tr. 254). Appellant's testimony further indicates that it was not until the third or fourth time in which the subject of marihuana came up (the subject was always broached by Thompson, according to Appellant's testimony [Tr. 253]) that he got the marihuana for Thompson and, again, this was after Thompson had requested the marihuana as a favor for his girl friend who was going through "a lot of changes" (Tr. 255). Appellant testified that after this request was made he learned from some of his friends in a pool room where he could get some "reefers" (Tr. 258). Thompson then gave Appellant five dollars and kept Appellant's wallet containing a drivers license, registration card, etc., for security while Appellant went to a person named Redfield, whom he had been told had the marihuana (by his friends in the pool

for "reefers", this time asking for them for his girl friend who was going through "* * * a lot of changes" (Tr. 252). Thompson told Appellant that he would be doing Thompson a big favor if he would get him the reefers. Appellant testified that he did not know what Thompson meant when he said his girl friend was experiencing these changes but that Thompson had said she was sick (Tr. 271).

Appellant also testified that he had told Thompson that he did not know where to get any reefers (Tr. 254). Appellant's testimony further indicates that it was not until the third or fourth time in which the subject of marihuana came up (the subject was always broached by Thompson, according to Appellant's testimony [Tr. 253]) that he got the marihuana for Thompson and, again, this was after Thompson had requested the marihuana as a favor for his girl friend who was going through "a lot of changes" (Tr. 255). Appellant testified that after this request was made he learned from some of his friends in a pool room where he could get some "reefers" (Tr. 258). Thompson then gave Appellant five dollars and kept Appellant's wallet containing a drivers license, registration card, etc., for security while Appellant went to a person named Redfield, whom he had been told had the marihuana (by his friends in the pool

room), and bought five marihuana cigarettes. Appellant then returned and gave the five sticks of marihuana to Thompson and Thompson gave Appellant a dollar for his trouble (Tr. 255-258). Thus the undercover officer had been soliciting the Appellant for "reefers" for approximately four weeks before the Appellant finally got them for him.

The Appellant testified that he was quite friendly with Officer Thompson during this period but that he never knew him by any other name than "Dap" and never realized he was a police officer until he was arrested (Tr. 259, 261, 266). During this same period of time, between the original meeting in August of 1961 and September 22, 1961 or thereabouts, the acquaintance of the Appellant and Officer Thompson developed into a friendly relationship according to both the officer's and Appellant's testimony (Tr. 67, 259). The officer further testified that he attempted to make purchases of marihuana from Appellant prior to September 22 but had been unsuccessful (Tr. 267), and that he first brought up the subject of narcotics about the second time he saw the Appellant (Tr. 68) but that the Appellant did not get him any narcotics before September 22, 1961 (Tr. 71). Thompson also testified that he might have told Appellant that he wanted the narcotics for his girl friend because he needed

to tell Appellant something to keep him interested (Tr. 70). The officer further testified that on each occasion that he received marihuana from the Appellant he had first asked him to buy the marihuana.

This Court recently decided, in an en banc decision, the narcotics case styled Smith v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____, (No. 17106, Feb. 20, 1964). The judgment and conviction were reversed because a majority of this Court were of the opinion that the trial judge erred in denying Smith's request for an instruction on entrapment. The issue of entrapment in Smith arose within a considerably different factual framework than it did in this case but the opinion of the majority indicates that this Court should have no great difficulty in deciding that, under the law of entrapment, the facts in the instant case clearly established the defense, see Smith, slip opinion, p. 12.

As shown above we have, in this case, the same "* * * repeated and persistent solicitation" by the authorities whichJustice Hughes spoke of in Sorrells v. United States, 287 U.S. 435, 441 (1932). The similarity between undercover Officer Thompson's participation in the situation leading up to the alleged statutory violation in this case with the inducement provided by the prohibition agent in Sorrells is

striking. Of course, in the instant case, the solicitations were made over a longer period of time before Officer Thompson achieved success.

The net result of the Government's participation in the events leading up to September 22, 1961 and the sequence which followed thereafter was to beguile the Appellant into committing a crime which he otherwise would not have attempted, see Sherman, supra, 356 U.S. 369 at 376. What Officer Thompson did to lay the groundwork for this prosecution was not the artifice and stratagem authorized to trap the criminally inclined. The words of Justice Frankfurter, in his Sherman concurrence are most apt.

> The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime (356 U.S. 369 at 384).

2. The Appellant Was Not Predisposed To Commit The Offense And The Government Failed to Prove Any Facts Justifying Its Inducement Of The Appellant To Commit The Offense.

Judge Learned Hand, in his opinion in United States v. Sherman, 200 F. 2d 880 (2d Cir. 1952), conceived of the

majority opinion in Sorrells v. United States, supra, as allowing the prosecution to reply to evidence showing an inducement by Government agents with facts showing that the accused was ready and willing to commit the offense charged, whenever the opportunity was offered, 200 F. 2d at 882. In other words did the prosecution, which has the burden on this question, Hansford v. United States, 112 U.S. App. D.C. 359, 303 F. 2d 219, 224 (1962), elicit sufficient facts to satisfy the jury that there was an excuse for their inducement; that the defendant stood ready to sell narcotics and needed no persuasion? The state of the evidence in this case compells a negative answer to this question. Here the Government's evidence totally failed to show any facts justifying its inducement of the appellant.

Appellant has no record of any prior narcotics violations and there is absolutely no evidence that he is a drug addict.[4/] In any event, Sherman, supra, 356 U.S. at 375, makes clear that past narcotics convictions are insufficient to prove that a defendant had a readiness to sell narcotics on any particular occasion. Appellant here testified that prior to meeting Thompson he had never purchased

---

4/ See Government's Reply to Appellant's Application For Release on Personal Recognizance Pending Appeal filed with this Court's clerk on February 28, 1964.

narcotics or marihuana before, that he had never attempted to sell any narcotics to Officer Thompson or anyone else on any prior occasion and that previously he had never had any connection with narcotics or marihuana (Tr. 261). Appellant's police record shows three forfeitures of $10.00 collateral on disorderly charges, one forfeiture of $10.00 collateral on an imcommoding sidewalk charge, one "no papers" on a disorderly charge, a thirty-day suspended sentence on a disorderly charge and one-year's probation for a petty larceny conviction which arose out of an original charge of robbery (pickpocket) in April, 1960, some three years prior to the Appellant's indictment for the present offense. In a relatively recent opinion this Court has already observed that a criminal record does not disqualify and accused from defending on the ground of entrapment and that:

> Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official. (Hansford, supra, 303 F. 2d at 222).

Appellant submits that the only record evidence which the Government might point to as showing a predisposition on Appellant's part to commit this offense is a statement by Detective Hood that when he briefed the new Officer Thompson on working in an undercover capacity he gave Thompson

certain complaints and "* * * Maurice Deans at that time, known as Younger, was one of the complaints that I gave him" (Tr. 167). But, of course, to claim that testimony concerning an unsubstantiated and unverified complaint which the police had received satisfies the Government's burden of proof on predisposition is preposterous. Consequently, for all of the reasons hereinbefore stated, the trial court erred in allowing the issue of entrapment to reach the jury.

C. The Trial Court Erred in Admitting Evidence of Appellant's Confession Which Was Obtained During a Period of Illegal Detention.*

Appellant was arrested at approximately 3:15 p.m. on April 16, 1963 and was taken to the Narcotics Squad office at police headquarters by Detective Hood (Tr. 162). During the trip to police headquarters and after reaching police headquarters the police "conversed" with Appellant and, as a result of these "conversations," Appellant allegedly made certain admissions which were recorded on police department forms and, during the trial, read into evidence (Tr. 185).

After the police completed booking and questioning the Appellant, they placed him in jail for the night and, on the following morning, he was taken before the United States

---

* With respect to this point Appellant desires the Court to read transcript pages 39-57, inclusive; 162-166, inclusive, 175-186, inclusive.

Commissioner to be advised, for the first time, of his rights and of the charge being brought against him.

The overnight stay in jail obviously represents an unnecessary delay under Rule 5(a) of the Federal Rules of Criminal Procedure as interpreted by Mallory v. United States, 354 U.S. 449 (1957). It seems that the first admission, which allegedly was made by the Appellant while in the car in the basement of police headquarters, was not recorded (Tr. 179) but that the second admission, allegedly made some undisclosed amount of time later, in the Narcotics Squad Office, was recorded.

Irrespective of which admission was recorded they were both allowed into evidence (Tr. 177 and 185). There is no evidence which shows the necessity for the stop in the parking lot outside of Police Headquarters and the conversation which took place at that point between Officer Thompson, Detective Hood and Appellant. There is, similarly, no evidence which indicates the necessity for the delay in police headquarters or the requirement for an overnight stay by the Appellant. Surely it cannot be said that Appellant's overnight in jail was for the purpose of verifying through third parties the alleged admission of Appellant, Mallory, supra. Neither can the overnight in jail be classified as an ordinary administrative step required to bring a suspect

before the nearest available magistrate. [5/]

This Court has made clear that the requirements of Rule 5(a) do not permit the police to justify unnecessary delay by claiming the unavailability of a committing magistrate. In the words of this Court, "* * * both by law and practice * * * application for hearing might have been made to * * * committing magistrates at any hour." Akowsky v. United States, 81 U.S. App. D.C. 353, 354, 158 F. 2d 649, 650 (1946); Jones v. United States, 113 U.S. App. D.C. 256, 258, 307 F. 2d 397, 399 (1962). Of course, here the police made no effort to seek a magistrate until some 19 or 20 hours after the arrest.

Appellant does not concede the legality of the interrogations following his arrest which were obviously designed to elicit damaging statements to support his arrest. See Jackson v. United States, 106 U.S. App. D.C. 396, 273 F. 2d 521 (1959). However, it is clear a fortiori that when the damaging statement concerning the offenses had been elicited, the further delay in keeping Appellant in jail overnight was "unnecessary" in terms of Rule 5(a). Moreover, as this Court stated in Jones, supra, "It is difficult to conceive [the] admission [of a confession] being non-prejudicial to the defendant under any circumstances" (307 F. 2d at 399). Here, as in Haynes v. Washington, 373 U.S. 503, 511 n. 8

[5/] There is no indication in the record of what transpired between the police and the Appellant during the night of April 16, 1963.

(1963) the continuing illegal detention,

> "* * * displays and confirms an official disregard by police * * * of the basic rights of the defendant."

D. The Trial Court Erred in Receiving in Evidence the Marihuana Notice and Demand Form and Further Erred by Not Framing His Instructions on the Reasonableness of the Notice and Demand Procedure in the Context of the Facts of the Case.*

Over Appellant's objection, the demand notice served on Appellant on June 25, 1963, the day the case was first set for trial, was admitted in evidence (Tr. 199, 201). Title 26, Section 4744(a) provides that persons produce, after reasonable notice and demand by the Secretary of the Treasury or his delegate, the narcotics order form required by Title 26 Section 4742.

In this case the Appellant was in the District Court cell block ready for trial on June 25, 1963 but a continuance was granted to July 8, 1963 at the request of the Government in order that it might serve Appellant with the "Notice and Demand to Produce Official Order Form, etc." Narcotics Agent Wilbur H. Jones testified to serving the notice on Appellant in the cell block on June 25, 1963.

Appellant, in his incarcerated state, could in no way comply with the demand that within eight days he produce

---

* With respect to this point Appellant desires the Court to read transcript pages 195-203, inclusive.

the order form for the 8 separate occurrences listed in the notice the most recent of which allegedly took place 17 months prior to the date of service of the demand. But the trial court admitted the evidence despite Appellant's objection. The trial court also refused to instruct the jury on this factual context surrounding the service of the notice on Appellant. All the trial court would do is read the language of the statute (Tr. 316, 321).

VII.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of conviction of the District Court be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

By /s/ Robert E. May
Robert E. May

By /s/ Gene P. Bond
Gene P. Bond

Attorneys for Appellant
(Appointed by this Court)

March 16, 1964

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this Brief by delivering a copy thereof to the following;

United States District Attorney
for the District of Columbia
United States Court House
Washington, D. C.

Dated at Washington, D. C., this 16th day of March, 1964.

/s/ Robert E. May

Robert E. May
Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,417

MAURICE DEANS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Was entrapment established as a matter of law where evidence was conflicting on the issue of appellant's motivation in selling marihuana to the undercover policeman?

2. Where the trial court conducted a hearing, heard argument and specifically found no unnecessary delay in arresting appellant after the last of a long series of offenses, can his denial of a motion for dismissal of the indictment for lack of a speedy trial be attacked by asserting he improperly preferred government testimony over that of the defense?

3. Was it error to admit at trial statements made by appellant at the scene of his arrest and within twenty minutes thereafter, when appellant himself testified at trial to the same matter contained in his statements?

4. Was the issue of reasonableness of time to reply to a demand for marihuana forms properly for the jury where the appellant made no showing of inability to get the forms beyond the bare fact of his incarceration?

INDEX

TABLE OF CASES

Cases—Continued — Page

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,417

MAURICE DEANS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Convicted on July 11, 1963, on 16 counts of an indictment for violation of 26 U.S.C. 4742(a) (transfer of marihuana, 8 counts) and 4744(a) (possession of marihuana, 8 counts), appellant received a sentence of five years each on the eight transfer counts, and 20 to 60 months on the possession counts, all sentences to run concurrently. Leave to appeal *in forma pauperis* was de-

nied by the trial court on July 30, 1963, but later granted by this court.[1]

The indictment returned on May 27, 1963, was predicated on eight transactions between appellant and Officer Thompson of the Metropolitan Police Department who was working under cover; the dates of the transactions were September 22, October 14, 23 and 28, November 18 and December 13 and 22 in 1961, and January 5, 1962. A commissioner's warrant for appellant's arrest was issued on April 24, 1962; the warrant was executed on April 16, 1963. Appellant was arraigned on the indictment on May 28, 1963; trial commenced on July 9, 1963, and concluded with the jury's return of their verdict on July 11, 1963. Appellant's motion to dismiss for want of a speedy trial was denied and sentence was imposed on July 15, 1963.

The Offenses

The chart appended to this brief depicts the eight transactions as proved by the Government, each transaction predicating two counts of the indictment, the odd-numbered counts relating to 26 U.S.C. 4742(a) (transfer) and the even counts relating to 26 U.S.C. 4744(a) (possession).

The first transaction was before the jury in some detail in both prosecution and defense testimony. Prior to September 22, Thompson had asked appellant if appellant could get him marihuana cigarettes. Appellant's refusal on these early occasions was attributed by Thompson to appellant's anxiety that Thompson might be a policeman; then, upon appellant's agreement to make the marihuana available, Thompson held appellant's wallet for security while appellant took Thompson's five dollars to his source, and returned with the cigarettes; appellant re-

---

[1] By order dated November 1, 1963, this Court granted leave to file the petition for leave to appeal, and on February 3, 1964, granted the petition. By further order dated March 13, 1964, appellant was enlarged upon his personal recognizance.

ceived a dollar for his participation (Tr. 71-78, 127, 131-132, 145, 257-258).

Appellant stated he accomodated Thompson in the first transaction out of friendship, and because Thompson strongly urged a girl friend's need for drugs; appellant testified he was told the girl friend was sick and "had gone through a lot of changes," and appellant "would be doing him [Thompson] a big favor by getting it [marihuana] for him" (Tr. 252, 254). Appellant did not know what "a lot of changes" meant, and did not know if the indisposition of the girl had anything to do with narcotics (though "it could have") (Tr. 271-272). According to appellant, Thompson asked him out of the poolroom before entreating him on September 22. Asking Thompson to wait outside, appellant returned to the poolroom for a minute, and returned to say he could get marihuana, but Thompson couldn't go with him (Tr. 255-257). Upon his return from a visit to one Redfield with the "reefers," he got his wallet back and kept a dollar; Thompson immediately left to pick up his girl (Tr. 258).

Thompson testified that appellant always brought exactly the number of cigarettes for which he was asked (Tr. 121), and was always paid (Tr. 131, 133). Appellant on other occasions indicated he could get narcotics, and Thompson made excuses not to buy (Tr. 91). They conversed freely in the parlance of narcotic users (Tr. 127-128). Thompson stated he never pressured, threatened or held out reward to appellant to insure appellant's assistance in getting drugs (Tr. 130, 133); this was corroborated by appellant (Tr. 283). Thompson denied that at any time he had stated his girl friend's sickness as a reason appellant should secure marihuana (Tr. 293).

As to the October transactions, appellant testified that he once repeated the style of the first transaction—again at the poolhall—on mention of Thompson's girl friend (Tr. 260). He agreed there had been a transaction following which he and Thompson had attended a party together where narcotics were in use, admitting his indul-

gence in some marihuana during the party (Tr. 264-265, 274). This coincided with Thompson's testimony of the fourth transaction (Tr. 25, 84, 116, 138, 148). Appellant testified that his last transaction with Thompson was "some time around November or December" and that after that he "didn't see him no more in the month of December" (Tr. 266). He was emphatic that he never saw Thompson in January (Tr. 266). He stated he had dealt in drugs only with Thompson (Tr. 261); Redfield was always his supplier (Tr. 262); he got a dollar at each transaction (Tr. 282).

Appellant admitted he had known Redfield before the first transaction but stated he didn't know Redfield had access to narcotics (Tr. 273). Redfield was a known narcotics peddler[2] (Tr. 134). Appellant denied knowledge of a man named Castro, who according to Thompson had been included in a proposal by appellant that Thompson join them in a "deal" involving the sale of some narcotics (Tr. 136). Castro was known to the police as a narcotics salesman (Tr. 137).

After his arrest in April 1963, appellant was taken immediately down town to police headquarters where he had elected to leave the car he was driving at the time (Tr. 177). On the way downtown, he admitted to the accompanying police officer that he did know Thompson (Tr. 162). On cross-examination of the officer defense counsel developed that while parking his car outside the police station, appellant again admitted he knew Thompson and had transactions with him (Tr. 177-178). The last of these admissions came within twenty minutes after his arrest (Tr. 164).

Apprehension of Appellant

Complaint was lodged and Thompson secured a warrant for appellant's arrest on April 24, 1962 (Tr. 38-39).

---

[2] See *Redfield* v. *United States*, No. 17,818, decided January 30, 1964.

At this time appellant was known to the police only as "Younger" (Tr. 39, 168, 293, 295), a nickname acknowledged by defendant and his landlady (Tr. 237, 241, 268), and the name under which the police had received the complaints which provoked Thompson's original interest in appellant (Tr. 167). Thompson testified he never saw appellant after the warrant was issued until he saw him on the day of arrest (Tr. 104, 106, 293). Proof offered by the Government was to the effect that efforts to locate appellant during this period were continuous (Tr. 40, 102, 105, 161, 170, 292-293, 296), but that lack of connection between the nickname and appellant's real name hampered this effort (Tr. 39, 168, 293, 295). Appellant ultimately was spotted in his cousin's car by Thompson—the only officer on the police force who knew him—on April 16, 1963, and was arrested by him at 3:15 p.m. (Tr. 65, 162, 169, 297).

Appellant testified that he twice saw Thompson between the two April dates, once at a Safeway store during the summer of 1962, and once again in November or December at the poolhall (Tr. 246-247). On the latter occasion Thompson had asked him to go "downtown and answer some questions to the Harrison narcotics"; since appellant did not know anything about "Harrison narcotics", he just walked away from Thompson (Tr. 248).

Appellant's *pro se* motion to dismiss for lack of speedy trial was briefed and argued as a preliminary matter in the District Court prior to the day of trial; it was denied without prejudice to its renewal at trial when the full factual background would be available to the court (Tr. 4). The motion was renewed at the start of trial; the trial judge reserved his decision until after the case had been presented to the jury (Tr. 1-3). Following trial, on July 15, 1963, the motion was denied (Supp. Tr. 1-5) and sentence was imposed.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence.

Title 26, United States Code, § 4742, provides in pertinent part:

> **(a) General requirement.**—It shall be unlawful for any person, whether or not required to pay a special tax and register under Sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Title 26, United States Code, § 4744, provides in pertinent part:

> **(a) Persons in general.**—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4741(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this Section and of liability for the tax imposed by Section 4741 (a).

Rule 5(a), Federal Rules of Criminal Procedure, provides:

> **Appearance before the Commissioner.** An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

SUMMARY OF ARGUMENT

Even the facts appellant carefully marshals do not make out entrapment as a matter of law. The evidence as a whole on entrapment was at best conflicting, and the issue was properly left for jury resolve.

Appellant's motion to dismiss for lack of a speedy trial was properly handled by the trial judge: he heard all the evidence on the reasons for the delay between the offenses and issuance of a warrant for appellant's arrest therefor; he reviewed evidence bearing on the interval between the warrant's issuance and appellant's arrest; and he heard

argument by counsel on the motion. In his opinion, he based denial of the motion on his finding that the first period of "delay" was necessitated by the nature of the offenses and the nature of the police activities required to complete the investigation. He further found as facts that the police were diligent in their search for appellant, but that their efforts were hampered by lack of knowledge of appellant's true name and whereabouts during the questioned period. Appellant's attack on these findings is no more than invitation to this Court to review the facts *de novo* from the record, a course not open on appellate review. Appellant did not make out a denial of due process from this delay before the trial court; he cannot do so from the facts of this case on this appeal.

The trial court was not in error in allowing the prosecution to prove threshold statements made on the scene of appellant's arrest and within twenty minutes thereafter. The statements were made while appellant was yet en route to the Narcotics Squad Office immediately following apprehension. They contained no more information than appellant himself offered the jury when he took the stand in his own defense.

Appellant's contentions that evidence of notice and demand for Treasury Department Marihuana Order Forms and his failure to produce them was improperly admitted are without merit. Appellant offered no substantiation for his position that he had not reasonable time to reply, beyond the bare fact he was in jail when demand was made nine days prior to trial. There was no request on the trial date for a continuance to answer the demand; and there was no testimony that he could have gotten the forms if he had been free, or had more time. The issue was properly for the jury, and was submitted on correct instructions.

ARGUMENT

I. The evidence does not establish entrapment as a matter of law; the issue was for jury resolution.

(Tr. 17, 66-67, 72-73, 83, 88, 90-93, 96, 132, 136-137, 144, 257, 263, 264, 271, 277-278, 282-284)

Appellant rests his entrapment argument on *Sherman* v. *United States*, 356 U.S. 369 (1958), and *Sorrells* v. *United States*, 287 U.S. 435 (1932). He selects portions of the testimony to indicate that " 'repeated and persistent solicitation' " by Thompson instigated the transaction; he claims to show that Thompson's girl friend's illness, the treatment of which by the "reefers" obtained as a favor for Thompson, was the moving force behind the transactions; and thus the net result was to "beguile" appellant into committing the crimes (Br. 27-33). This firmly established, he contends the Government offered only an "unsubstantiated and unverified complaint" of appellant's activities in narcotics trade to prove predisposition.

In *Sherman*, *supra*, the majority took pains to point out that:

> ". . . [w]e reach our conclusion from the undisputed testimony of the prosecution's witnesses." *Sherman* v. *United States*, *supra* at 373. (Emphasis supplied.)

There is no need to discuss whether appellant's chosen facts are sufficient to establish the defense as a matter of law since it is abundantly clear there was conflicting testimony as to the role played by Thompson in the transactions in question.[3] Thompson testified that appellant's first refusals to sell marihuana came because he feared

---

[3] In comparison with *Sherman* v. *United States*, *supra*, the instant record simply does not reflect the persistent requests made of a weak and addicted man which there required reversal. See *Sorrells* v. *United States*, *supra*. Appellee submits that *Smith* v. *United States*, 110 U.S. App. D.C. 344, 293 F. 2d 532 (1961), is dispositive of appellant's view of the case.

Thompson might be a policeman, not because he did not know where to get marihuana; appellant's own testimony bore this out (Tr. 66-67, 144, 283). See *Trent* v. *United States*, 109 U.S. App. D.C. 152, 284 F.2d 286 (1960). While on occasion Thompson brought up the subject of narcotics prior to the transaction (as appellant himself did at other times) it was usually in a general way—"what's happening?"— indicating no more than that he (Thompson) was in the market for drugs if appellant wanted to sell (Tr. 83, 88, 90-93). Appellant could easily have refused such a proffered opportunity had he so desired, the jury might have found. Thompson did not think appellant ever refused to get what he (Thompson) asked for after the first sale; appellant received a dollar at each transaction (Tr. 90, 92, 96, 132, 282, 298). Thompson denied he ever told appellant his girl "was going through the changes"; he had stated only that possibly he told appellant he and his girl smoked marihuana on occasion (Tr. 293, 297a). Appellant himself testified that he did not even know if the girl's sickness from "the changes" had anything to do with narcotics; he stated that Thompson himself was never sick, and that Thompson never threatened or promised him anything (Tr. 271, 283-284). The holding of the wallet as security during the first transaction—an agreed circumstance—negates even a situation of altrustic camaraderie (Tr. 17, 72-73, 257). In this state of the evidence the question properly was submitted to the jury. *Denison* v. *United States*, —— U.S. App. D.C. ——, 325 F.2d 623 (1963); *Nickens* v. *United States* —— U.S. App. D.C. ——, 323 F.2d 808 (1963); *Trent* v. *United States*, *supra*.

Beyond this evidence, the jury had before it evidence of appellant's predisposition which—in addition to complaints to the police department—showed appellant to be affiliated in the narcotics trade with one Castro, a known drug dealer; the evidence indicated a business relationship between Redfield—a known peddler—and appellant

such that Thompson at one point felt it necessary to pay appellant a dollar when he (Thompson) bought directly from Redfield (Tr. 97); there was also testimony which indicated appellant was conversant with terms of the narcotics trade[4] though he denied he knew what the terms meant (Tr. 136-137, 263-264, 277-278, 282). There was evidence of appellant frequenting known addict hangouts and his partaking of marihuana in the officer's presence (Tr. 125, 134, 138-139, 148, 149, 274). The jury verdict on the several counts to which appellant offered the entrapment defense indicates the jury resolved the issue unfavorably to him.[5] Appellant does not contend they were not correctly instructed.

II. Appellant's motion to dismiss the indictment for lack of a speedy trial was properly denied.

(See Tr. 39, 40, 45, 102, 104, 105, 106, 107, 115, 161, 168, 169, 170, 290, 292, 293, 295, 296, 297 and Supp. Tr. 1-5.)

Appellant contends that the delay between the commission of the offenses and presentation to him of his indictment constituted a denial of his Sixth Amendment right to a speedy trial. U.S. Const. Amend. VI. Asserting the delay as prejudicial, he blandly states "the Government was unable to produce any evidence to justify the delay" (Br. 18). He urges that circumstances of this

---

[4] Excerpt from appellant's direct examination:

"The Witness: . . . I just introduced him [Thompson] to Redfield so I wouldn't have to be *copping* for him.
The Court: Did you say *copping?*
The Witness: Yes, copping, man." (Tr. 263-264) (emphasis added).

[5] As noted in the chart in the Appendix, appellant's defense to the last four counts is denial of the occurrence of the predicate transactions seven and eight. In view of the concurrent sentences imposed, even if appellant prevailed on his entrapment contention, the conviction still would needs be affirmed on this point. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Redfield* v. *United States*, No. 17,818, decided January 30, 1964.

case—chiefly as advanced in defense testimony—commanded dismissal of the indictment. He then implies the trial court erred in not so disposing of the motion which was continuously pressed in the court below.

This court has had occasion in recent months to indicate steps predicating a proper disposition of such a motion to dismiss an indictment,[6] whether the pre-arrest delay involved is passage of time after offense in issuing the warrant, *Ross* v. *United States*, No. 17,877, remanded by order dated January 28, 1964, or a period between complaint and arrest, *Harvey* v. *United States*, No. 17,852, aff'd by order, October 4, 1963. The resolution of issues thus presented has been held to lie within the sound discretion of the trial judge. *United States* v. *McWilliams*, 82 U.S. App. D.C. 259, 163 F.2d 695 (1947).

Appellant does not attack the procedure by which the judge heard evidence on the motion as the case was presented to the jury. After the jury took the case, the judge heard argument and delivered orally his opinion in denying the motion (Supp. Tr. 1-5). Appellant's course is to reargue on appeal the weight that should be given testimony by defense witnesses, testimony conflicting with police testimony on which the trial judge based his decision (Br. 23-25). This approach on appeal has been held frivolous where there is evidence to support the court's resolution of factual issues. *United States* v. *Johnson*, 327 U.S. 106 (1946).

Any issue with regard to the interval between the offenses and issuance of a warrant is resolved by *Redfield* v. *United States*, No. 17,818, decided January 30, 1964, which involved two of the principals of the instant case, Thompson and Redfield, and the identical time period.

---

[6] The trial and this motion antedated this court's decision in *Nickens* v. *United States*, *supra*, which holds that the period of delay involved in the instant case is not reached by a motion to dismiss for lack of speedy trial or motion under F. R. Crim. P. 48(b). 323 F.2d at 809. Appellant does not contend the statute of limitation voids the indictment. His footnoted claim of denial of due process is thus the only proper ground for the motion.

The trial court here found a need to maintain the officer's undercover status, noting the recurring nature of the transaction and the nature of the offenses (Supp. Tr. 3-4).

The record is rife with support for the finding that the police exerted due dilligence to effect arrest once the warrant issued. The police officers testified that they knew appellant only as "Younger," a name not in their alias file for appellant (Tr. 39, 168, 293, 295). Though they searched the files, they never had access to his police record; thus Thompson was the only officer who knew him (Tr. 65, 169, 297). They went to addresses where appellant had said he lived but never to 1327 T Street which was his home only for "about a year" prior to arrest (Tr. 104, 105, 244, 290). The police made numerous attempts to find him during the whole period, but never saw him (Tr. 40, 102, 105, 161, 170); Thompson testified he never saw appellant at the poolroom after the warrants issued (Tr. 104, 293); he never avoided going to places where appellant might be (Tr. 106). The police even approached a female acquaintance of appellant trying to learn his whereabouts from her; but she said she had not seen him, and Thompson disclosed to her he was a police officer and was looking for appellant (Tr. 170, 292-293, 296).

The judge had before him a transcript of the proceedings in which Redfield was tried, indicating the police were active in following up Thompson's investigations (Tr. 107-115). From the last two circumstances noted above the judge may have inferred that appellant had learned of Thompson's identity, and fearing he—like Redfield—would be picked up, moved his residence and assiduously avoided his old haunts where he knew Thompson would be looking. Appellant's own testimony would not defeat this inference: he had lived at 1327 T Street, N.W., only for "about a year"; thus he could have moved after the warrant issued (Tr. 244). As it was, he eventually was spotted by Thompson, not "hanging around" his former haunts, but in a moving car (Tr. 45, 161).

On this record, the trial judge's decisions must remain dispositive of the motion. *United States* v. *Johnson, supra; Harvey* v. *United States, supra.*

For the first time in this litigation, appellant advances the proposition that the interval between the commission of the offenses and his confrontation with the charges following indictment was a denial of due process, citing *Pollard* v. *United States*, 352 U.S. 354 (1957). See *Nickens* v. *United States, supra*, 323 F.2d at 810 n. 2. While this argument was not before the trial court, the opinion there is dispositive of the issue. The judge—noting appellant was free until a few months before trial, and noting further appellant's defense in the case—made specific findings that the delay "was not detrimental to appellant" (Supp. Tr. 2); that appellant was not "prevented from properly protecting his interests" (Supp. Tr. 3); and that the action of the police "was for no ulterior purpose, nor oppressive to the defendant" (Supp. Tr. 4, 5).

A finding of denial of due process must be predicated on a showing that "absence of fairness fatally infected the trial" and that "the acts complained of must be of such a quality as necessarily prevents a fair trial." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). Where delay in trial is advanced as a denial of due process, it is incumbent upon the accused to show he has been unfairly prejudiced thereby. *United States ex. rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963).

Appellant makes no such showing. At best the extent of unfairness he urges is that he was "unable to recall the particular dates and circumstances involved" and "unable to remember what occurred on many of the dates listed in the indictment" (Br. 18, 19). The thrust of this argument is either that a bad memory is an excuse to avoid prosecution for forgotten misdeeds, or that the span of an average recall should replace the statute of limitations, perhaps depending on the type of defense involved. The trial judge's findings of fact negate appel-

lant's urging that the acts of the policemen fatally infected the trial with unfairness.[7] The ruling below should be affirmed.

III. There was no error in admitting into evidence appellant's threshold confessions to the police.

(Tr. 46, 162, 164, 177-185)

Lack of evidence showing necessity for the delay between appellant's arrest and his presentation to a committing magistrate rendered admission of his confessions erroneous: this is appellant's next claim (Br. 36-39). Appellant's conversation with police en route to police headquarters is here referred to, and a subsequent reading of parts of police forms on which were recorded substantially these same statements (Tr. 46, 162, 164, 177-185). The statements from the police forms were introduced at the instance of defense counsel on cross-examination of a Government witness. The substance of what the jury heard was that appellant had stated he knew Thompson, had gone around with him in his car, and had gotten marihauna for him (Tr. 177-178). It was told that appellant had admitted "he sold the narcotics to undercover Officer Thompson of the Narcotics Squad and on each occasion he would make $1.00 on the transaction with the undercover officer" (Tr. 184-185). Since the defense had pressed for a reading of the statements—their third mention at the trial—there was no objection made to their entry, nor was motion made to strike the purportedly offensive materials once they were in.

The statements made prior to entering the police station are clearly of the threshold variety: they occurred at least within 20 minutes of arrest (Tr. 164), partially when appellant was initially stopped, the balance while the police were trying to accommodate appellant in the

---

[7] In defending the final four counts, appellant offers simply denial of the transactions. No memory problems enter into this defense. These counts would be dispositive of this point on his appeal, since the sentences are concurrent. See footnote 5, *supra*.

parking of his car in a safe place (Tr. 177); moreover the statements contained no more information than appellant himself supplied at trial. Their introduction cannot be held error where he himself furnished them to the jury, and at no time requested a hearing. *Bailey* v. *United States*, No. 17,834, decided February 6, 1964; *Gardiner* v. *United States*, —— U.S. App. D.C. ——, 323 F.2d 275 (1963), *cert. denied*, 375 U.S. 976 (1964); *Jackson* v. *United States*, 114 U.S. App. D.C. 181, 313 F.2d 572 (1962).

As to later statements appellant made in the narcotics office, the prosecutor, at the suggestion of the trial judge, had agreed they were not necessary and abandoned a line of questioning which could have brought them in (Tr. 165). They were never before the jury.

IV. The reasonableness of the demand made upon appellant for the marihuana order form was properly an issue for the jury.

(See Tr. 18, 21, 24, 26, 31, 33, 35-36, 197-199, 314-316.)

The requirement of reasonable notice and demand for the marihuana order form required by 26 U.S.C. 4744(a) is not an element of the crime of possessing marihuana. 26 U.S.C. 4742(a); *Cratty* v. *United States*, 82 U.S. App. D.C. 236, 163 F.2d 844 (1947). If demand is made and no form or explanation for lack thereof is forthcoming, the non-payment of the tax—an element of the crime—is deemed established. *Gondron* v. *United States*, 256 F. 2d 205 (5th Cir. 1958). A factual question, the reasonableness of the time allowed for reply is a jury issue. *Miller* v. *United States*, 273 F.2d 279, 281-282 (5th Cir. 1959) (accused was "in jail and unwarned"; *held* notice and demand not unreasonable as a matter of law).

Appellant's contention here is that the government was precluded from proving notice and demand because he was in jail at the time notice and demand were made: "appellant, in his incarcerated state, could in no way com-

ply with the demand . . ." (Br. 39). The record does not indicate he asked for further continuance to comply; there was no defense testimony that but for his incarceration, appellant would have complied with the demand. Defense counsel doubtless realized the weakness of arguing unreasonableness as a matter of law, for the thrust of his resistance to proof of demand was the improvident grant of an earlier continuance of the case (Tr. 197-199).

On the facts, reasonableness was clearly a jury issue. Defense counsel himself knew demand would be made since he was in court when the case was continued to allow the notice and demand (Tr. 198-199). Though defendant was incarcerated, he had counsel who was on notice of the demand, and might have secured the forms. Other cases have noted the impact of such as these and the above circumstances in holding demand reasonable even on the day of trial. See *Gondron* v. *United States, supra; cf. Cratty* v. *United States, supra.*

The issue appropriately one for jury resolution, the court did not err in instructing—as appellant concedes he did—in the language of the statute (Tr. 314-316). *Maynard* v. *United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954).[8] In any case, this asserted defect would only reach the possession counts, 26 U.S.C. 4744(a), and failure on these counts would not be fatal to this court's affirmance. See footnote 3, *supra.*

---

[8] If anything, the court's charge was overly generous to the defense since it limited government proof of non-payment of the tax to presumption afforded by statute, excluding jury consideration of other proof of non-payment such as the clandestine nature of the transactions, and Thompson's recurring testimony as to the lack of forms and tax stamps (Tr. 18, 21, 24, 26, 31, 33, 35-36). This other proof was competent of itself to establish non-payment. *Gondron* v. *United States, supra; Cratty* v. *United States, supra.*

CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

APPENDIX

CHART #1: Narcotics Transactions between Appellant and Officer Thompson

Transactions	Date and Time	Location	Nature of Transaction (Thompson's Testimony)	Appellant's Defense
(1) (Counts 1 and 2) (Tr. 17-18, 57, 66, 71-78, 125, 131-132, 145-146, 254-258, 271-272)	9-22-61 2:15 a.m.	14th & Wallach Sts., N.W.	Thompson asks if appellant can get marihauna; Thompson holds appellant's wallet as security for $5.00 which appellant takes and gets five cigarettes. Appellant receives a dollar.	*Entrapment* (Thompson's girl sick from "going through changes").
(2) (Counts 3 and 4) (Tr. 20, 22, 78-82, 260)	10-14-61 9 P.M.	Colt Lounge	Thompson asks if appellant knows where he (Thompson) can get any marihauna; Thompson retires to the men's room; on his return he asks for four cigarettes, gives appellant $5; appellant give money to Redfield who gives appellant four cigarettes and one dollar; appellant gives Thompson the cigarettes.	*Entrapment* to the one transaction he can remember; (Thompson's girl was sick) Denial of transactions at other than poolhall.
(3) (Counts 5 and 6) (Tr. 22-24, 82, 260, 261)	10-23-61 10 P.M.	Colt Lounge	Thompson asks appellant "what's happening?" Appellant replies "plenty" and asks what Thompson wants; Thompson wants "three things" [cigarettes]; rest of transaction same as No. 2. Thompson gets three cigarettes; appellant keeps a dollar.	
(4) (Counts 7 and 8) (Tr. 25-26, 84, 116-117, 132, 138, 148, 260, 265, 284)	10-28-61 1 A.M.	1900 block of 14th Street	Appellant offers to get Thompson some "T and T" (powerful narcotics); appellant and Thompson find the supplier; Thompson gives $5 to appellant who gives it to supplier; appellant gets four cigarettes and $1 from supplier, and gives cigarettes to Thompson; Appellant and Thompson then go to party.	Does not recall the circumstances of the transaction. (Does remember party).

Chart #1 (cont'd)

Transaction	Date and Time	Location	Nature of Transaction (Thompson's Testimony)	Appellant's Defense
(5) (Counts 9 and 10) (Tr. 29, 31, 88, 90, 95, 266)	11-18-61 1 A.M.	In front of Colt Lounge	Appellant is asked for marijuana; he finds Redfield and returns; Thompson says he wants four "sticks", which appellant gives him, Thompson then gives appellant $5.	Recalls only one transaction in this period.
(6) (Counts 11 and 12) (Tr. 31-33, 90-91, 95, 119, 135-136, 264-266)	12-13-61 10 P.M.	In front of 1459 Chapin St.,	Thompson and appellant meet, talk about marijuana; go in Thompson's auto to 1459 Chapin St.; appellant goes in and gets three cigarettes which he gives to Thompson for $4.	
(7) (Counts 13 and 14) (Tr. 34-36, 93-94, 120, 266)	12-22-61 7:30 P.M.	In front of 1459 Chapin St.,	After conversation about narcotics, Thompson drives appellant to 1459 Chapin St.; appellant goes in, returns with four cigarettes; Thompson gives him $5.	*Denial* (Appellant did not see Thompson any more in December).
(8) (Counts 15 and 16) (Tr. 36-38, 94-101, 120, 266)	1-5-62 9:30 P.M.	14th & T Sts.,	Thompson takes appellant to 1459 Chapin St; takes a $5 bill from Thompson into the house; when he returns, Thompson drives him to 14th and T Streets, where appellant gives him 4 cigarettes.	*Denial.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 728206 871

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,417

Maurice Deans,

Appellant,

v.

United States of America,

Appellee.

PETITION FOR REHEARING EN BANC
AND FOR ORAL ARGUMENT

Comes now Maurice Deans, Appellant in the above-entitled proceeding, by his court-appointed counsel, and pursuant to Rule 26 of this Honorable Court petitions for a rehearing en banc, for oral argument, and for reversal of the per curiam judgment entered herein on July 6, 1964,

affirming Appellant's conviction in the United States District Court for the District of Columbia. In support of this petition, Appellant states as follows:

I

Appellant was indicted and convicted of unlawfully transferring marihuana and obtaining marihuana as a transferee without payment of the tax and was sentenced to imprisonment for a period of five years. Appellant was permitted to proceed on appeal to this Honorable Court in forma pauperis with the undersigned representing him as court-appointed counsel. Oral argument was heard on May 7, 1964 before Judges Edgerton, Washington and Burger. On July 6, 1964, in a per curiam judgment, the Court affirmed the judgment of the District Court.

II

This appeal involves important issues, particularly in respect to the delay in arrest and prosecution of Appellant for the alleged offences and in respect also to Appellant's entrapment by an undercover officer of the Police Department who actively solicited Appellant to commit the alleged offences.

This Court's judgment discusses only Appellant's contention that he was denied a speedy trial and was prejudiced by the undue and unreasonable delay which occurred in his arrest and prosecution. There is no mention in the judgment of Appellant's contention that entrapment by the undercover officer was proved as a matter of law and the question should not therefore have been submitted to the jury, or the other legal contentions advanced by Appellant.

III

The judgment entered by this Honorable Court admits and recites that "the delay between the time of some of the offences and the time of the arrest was substantial" but nevertheless concludes that "the testimony of the defendant-appellant demonstrated his ability to recall the details of the transactions, and thus tended to negate prejudice from the delay." The evidence demonstrates that Appellant was not arrested until nineteen months after the first alleged offense and was not notified of the other alleged offenses until some twenty months after the first alleged offense. Moreover, the Government did not offer any substantial or credible evidence to excuse this long delay. Appellant's testimony is convincing that he was prejudiced by the long delay. On at

least two occasions he testified that he could not remember the dates of the alleged offenses. Thus, at transcript page 252 he testified "I can't remember the date, I can't remember back that far." Again, at transcript page 255 he testified, in response to a question:

> "Q. Mr. Deans, can you specifically state whether or not you know the transactions took place on the dates named in the indictment?
>
> "A. No, I can't remember. I couldn't say."

The language of Judge Wright of this Court in his concurring opinion in the Nickens case (323 F. 2d at page 813) is particularly and peculiarly applicable to the situation here. Judge Wright there stated:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

Moreover, in a recent decision by this Court in Tee Ann Wilson v. United States, No. 17,895, decided February 14, 1964, where the period between the offense charged and the arrest was six months, as contrasted with over three times that in this case, or 19 months, Chief Judge Bazelon and Judge Wright, in their dissent, commented upon the fact that narcotics charges are "difficult to defend against" and "they are aggravated in this case, as in many others, by the long delay before the defendant was put on notice of the charge by being arrested." It was stated further:

> "At the very least, the Government should be required in each case to justify its delay. Beyond that, assuming that this method of law enforcement is to be allowed, we should recognize the onerous burden it puts on the defendant. We should then consider whether additional proof from the Government is required in order to dispel obvious misgivings about convicting a defendant whose ability to defend himself has been substantially impaired."

Also, in Ross v. United States, No. 17,877, referred to in the Tee Ann Wilson case, in an order issued January 28, 1964, this Court remanded the case to the District Court to conduct a hearing on the "reasonableness vel non of the delay occurring between the alleged offense by Appellant and the Appellant's arrest therefor, and its effect, if any, on the defense of the case." In that case, the delay was seven months, as contrasted with 19 months in this case.

IV

As stated previously, the judgment of this Honorable Court does not discuss Appellant's contentions that entrapment as a matter of law was established and the indictment should therefore have been dismissed on that ground. The evidence demonstrated that an undercover officer of the Police Department actively induced and solicited Appellant to commit the alleged offenses. Among other things, the undercover officer became acquainted with Appellant by misrepresenting his identity; falsely representing himself to be a drug addict to Appellant; providing an automobile for the purpose of solicitation of purchases, and the undercover officer furthermore testified that on every occasion he took the initiative with and induced Appellant to obtain marihuana for him. The conduct of the undercover officer brings this case squarely within the doctrine of the Sorrells (287 U.S. 435) and the Sherman (356 U.S. 369) cases.

The facts of both the Sorrells and Sherman cases bear a striking similarity to the present case.

Sorrells was convicted of violating the National Prohibition Act, and relied upon the defense of entrapment. The evidence showed that the prohibition agent involved, posing as a tourist and striking up a friendship with the defendant based upon common military service, prevailed upon

the defendant, after at least three attempts, to purchase liquor for him. The Government relied upon the alleged reputation of the defendant as a rumrunner but there was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the particular transaction in question. In this case, as in the Sorrells case,

> "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

In the Sherman case the defendant was convicted of three narcotics violations. He claimed entrapment by a Government informer. The evidence showed that the informer first met the defendant at a doctor's office where apparently both were being treated for narcotics addiction. After a friendship had been established, the informer made repeated requests of the defendant to supply him with a source, pleading his own suffering as an excuse, and furnishing a portion of the money with which the purchase was made. The same procedure was followed several times and the defendant was thereafter arrested, tried and convicted. The Supreme Court emphatically reaffirmed the doctrine of the Sorrells case. It stated that:

> "The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehensions of criminals. Manifestly, that function does not include the manufacturing of crime."

In the Sherman case, as here, the question of "entrapment had gone to the jury and the jury had convicted. Nevertheless, the Supreme Court concluded from the evidence that "entrapment was established as a matter of law" and remanded "with instructions to dismiss the indictment."

WHEREFORE, Appellant respectfully petitions this Honorable Court for a rehearing en banc, for oral argument and for reversal of the per curiam judgment issued herein on July 6, 1964.

Respectfully submitted,

/s/ Robert E. May

By_____

Robert E. May
1700 K Street, N. W.
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

July 20, 1964

CERTIFICATE OF GOOD FAITH

I hereby certify that this Petition is presented in good faith and not for delay.

/s/ Robert E. May

Robert E. May

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this Petition for Rehearing En Banc and for Oral Argument by mailing a copy thereof to the following:

United States District Attorney
for the District of Columbia
United States Court House
Washington, D. C.

Dated at Washington, D. C. this 20th day of July, 1964.

/s/ Robert E. May

Robert E. May
Attorney for Appellant
(Appointed by this Court)